IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-214

BERKELEY SCHOOL DISTRICT, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

PROCEEDINGS SUBSEQUENT TO APPLICATION

On October 15, 1975, the Board of Education of the Ferguson-Florissant School District submitted to the United States District Court for the Eastern District of Missouri a Report concerning the implementation of the desegregation Plan, pursuant to the District Court's Order of January 9, 1975.

This Report notes that, because of "changing population patterns in the District," it is "virtually impossible in some areas to comply with student reassignment recommendations in the Plan," and specifically refers to the Berkeley School District's

Holman and Springdale Elementary Schools and the Berkeley Junior High.[1] Thus, the prediction of Berkeley's expert witness, David J. Armor, that the Three-District Plan will lead to resegregation in Berkeley, proves alarmingly accurate (Tr. 765, 766).

As shown on pages 4 and 5 of the Report, the new District is already experiencing unexpected financial problems due in part to the reduction in State aid resulting from the merger.[2] (The financial difficulties created by the Three-District Plan were discussed in Berkeley's Petition for Certiorari, page 16, footnote 11).

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[1] Pages 9, 10 and 11 of the Report attached as a Supplemental Appendix (A-1-A-2) to this Brief. This Report, together with the exhibits incorporated therein, is 1¾ inches thick and is not reproduced herewith in its entirety.

[2] Pages 4 and 5 and one of the introductory pages of the Report attached as Supplemental Appendix. (A-3-A-5). The financial problems resulting from raising the Ferguson and Kinloch salaries to the Berkeley level had not been encountered as of the filing of the Report.

ARGUMENT

I

The Government's argument concerns itself with the 1937 wrongdoing by a then all-white community and remains blind to the fact that the effect of the retribution to be exacted upon the community (not upon the original wrongdoers themselves) will have the result in 1975 of resegregating a 40/60% unitary school district into a predominantly Black district. By fastening its attention solely on the events that occurred in 1937, the Respondent has ignored the sociological effect of the Decree and the entire thrust of the arguments made by the Berkeley School District in its Petition for Certiorari, to-wit:

1. Should not present conditions be the primary concern of the courts?

2. May the courts order the merger of independent school districts and a tax increase without voter approval even where unneeded to accomplish desegregation?

3. Are not demographic and sociological factors of primary importance in desegregation plans?

4. Should not the courts consider the views of Congress and order desegregation plans that minimize busing?

The fact that Berkeley, one of the few integrated school districts in St. Louis County, is, because of its inclusion in the desegregation Plan, experiencing population changes that will upset the racial balance that it now possesses, and the fact that the inclusion of Berkeley in the Plan will not accomplish desegregation in the Kinloch District, are matters that have neither been contested by Respondent nor given consideration by the courts

below.[3] Should these facts be ignored simply because Berkeley was segregated in 1937? Is retribution the overriding concern in desegregation cases? Does this not run counter to the Court's edict that desegregation plans must take "into account the practicalities of the situation" and must be "reasonable, feasible and workable"? *Wright v. Council of the City of Emporia*, 407 U.S. 451, 468, 469.

Brown v. Board of Education, 347 U.S. 483, is a landmark not only in the development of American law but also in the Nation's social progress. Now, over twenty years later, the United States Department of Justice in the instant case is concerned more with an ancient wrong than with present reality. Respondent's argument that the "nature of the violation determines the scope of the remedy" (Respondent's Brief, pages 6 and 7) does not take into account present conditions that should be considered in determining the nature of the violation. This argument does not take into account the fact that the desegregation of Kinloch, with its 979 pupils, can be affected by its inclusion in the Ferguson District with a student population of 16,556 pupils, which is less than 5% Black, and that this cannot be aided, enhanced or expedited by adding thereto the 1,724 Black pupils from Berkeley. Nor does the Respondent's argument consider the fact that the Black residents of Berkeley, who constitute over 40% of the school population there, outnumbering the pupils in Kinloch by two-to-one, are, because of the desegregation Plan, to be deprived of the right to live and be educated in an integrated community, and at the same time be subjected to a substantial increase in their property taxes, all because of a matter that occurred in 1937, over which they had no control.

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[3] Cf. Joint Appendix, pages 5, 7, 11 and 12.

II

Respondent's cavalier disregard of the Missouri Constitution, which requires voter approval of school tax increases,[4] is expressed in the footnote that concludes its Brief. The contention that the Court-ordered tax increase is constitutionally permissible because it was "recommended by the state and county defendants" is an incredibly simplistic treatment of a subject to which this Court devoted 137 pages (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1).

The Government offers no discussion of *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 232-234, upon which it relies to support the proposition that courts may order a tax increase to help implement desegregation plans. The judgment ordering the Prince Edward County "Supervisors to exercise the power *that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia" (l.c. 233, emphasis added) is no authority for the Court of Appeals to affirm an Order that takes from the voters in the Berkeley School District a right that they possess under a provision in the Missouri Constitution that is not discriminatory in purpose or in effect.

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[4] Missouri Constitution, Article X, §§ 11(b) and (c); discussed in Berkeley's Petition, page 13.

CONCLUSION

The Petition for Writ of Certiorari, heretofore filed by Berkeley School District, et al., should be granted.

Respectfully submitted

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APPENDIX

PUPIL ASSIGNMENT

Changes in Pupil Assignment

The District administrative staff is developing a Student Reassignment Plan designed to meet the provisions of the Revised State Plan and the Court Order of January 9. A pupil reassignment directory is being developed for each attendance area affected by the Plan which will show the student's name, street address, grade level, and present school attendance area. This directory will be updated throughout the current school year to show changes in enrollment and racial composition in each attendance area. In planning for student reassignment for the 1976-77 school year, the administrative staff will follow the pupil reassignment requirements set forth in the Revised State Plan as modified by the Court. Since the time the Plan was developed, changing population patterns in the District have made it virtually impossible in some areas to comply with the student reassignment recommendations of the Plan and at the same time meet the requirements for maintaining racial balance. It is no longer possible, for example, to redraw the attendance boundaries in the Kinloch Elementary, Holman, and Springdale attendance areas so that the percentage of non-white students in each of these three schools is between 35 and 45 percent. The percentage of non-white students attending Berkeley Junior High has also been steadily increasing and as of this September is 46 percent of the total population of the school. If one-third of the students at Kennedy Junior High are transferred to Berkeley Junior

High, the possibility exists that the school over a short period of time may become segregated. Also, if at the time this reassignment of students is made the non-white enrollment of Berkeley Junior High is in a majority, the transfer of additional non-white

students into the school would violate the Student Transfer Policy established by the January 9 Court Order. Other difficulties are presented by the Pupil Assignment section of the Revised State Plan. According to the Plan, for example, Smith Elementary School is to be paired with Caroline School and become a 5th-6th grade center. It is also to receive fifth and sixth grade students in the Frostfield attendance area living west of Graham Road. Given that the enrollment of both Smith and Caroline Schools has been steadily declining and the fact that there are no fifth and sixth grade students in the Frostfield area living west of Graham Road, it is unlikely that Smith School will be able to maintain the necessary enrollment to achieve any measure of racial balance. These and similar circumstances as they develop will have to be taken into account by the District staff in planning the implementation of the Pupil Assignment section of the Revised State Plan. Nevertheless, the administrative staff whenever possible will follow the recommendations on pupil reassignment set forth in the Revised State Plan and the Court Orders of January 9 and June 7. The staff understands that in granting the District flexibility in its authority to make student assignments, the Court prohibited deviation from the Revised State Plan which would result in a lesser degree of integration in any school than

projected under the Plan. The Biracial Advisory Committee which will take a direct role in the implementation of the Student Assignment section of the Plan is also aware of this limitation.

INTRODUCTION

A preliminary budget for the enlarged District for 1975-76 was developed by representatives from the three former districts. That preliminary budget, which was approved by the Board of Education on August 13, 1975, showed an anticipated operational deficit in excess of $400,000. The recent reduction in State appropriations for public school districts in Missouri, however, resulted in a further reduction in State revenue for 1975-76. This change is reflected in the Revised Budget which was adopted by the Board on October 8, 1975. That budget shows total estimated expenditures of $30,866,401.73 against total anticipated receipts of $30,031,-985.43, resulting in an operational deficit of $834,416.30. Included in the Revised Budget are funds for Kinloch area schools for additional staff, the purchase of needed textbooks and instructional materials, and other necessary improvements in the Kinloch educational program which will qualify those schools for AAA accreditation. The Board of Education has also established within the provisions of the applicable statute and the decision of the U. S. Court of Appeals a tax rate of $5.38 per hundred dollars assessed valuation. The tax rate was certified by the Board in July, 1975 to the Department of Revenue of St. Louis County.

GOVERNANCE AND FINANCING

1975-76 Budget

Under the direction of the Superintendent, a unified budget for the enlarged District was developed for the 1975-76 school year. That budget was adopted by the Board on August 13, 1975. Representatives from all three former districts worked on the formulation of the combined budget. To a large extent, it represents a combination of the budgets developed individually by the three districts for the 1975-76 year. The merger of the three districts, however, resulted in a loss of approximately

$350,000 in State Aid and anticipated receipts had to be revised downward. It was also necessary to increase expenditures in some areas to meet the requirements of the Revised State Plan. The expenditures for the Kinloch Schools were also increased by approximately $400,000 in order to provide for needed equipment, textbooks and instructional materials as well as additional staff. The loss of State Aid coupled with a necessary increase in expenditures made a balanced budget impossible. The budget approved by the Board in August showed an anticipated operational deficit in excess of $400,000. The recent reduction in State Appropriations for Public Education will cause a further reduction in State revenue and increase this deficit to nearly $800,000. These changes are reflected in the Revised Budget accompanying this Report (see Appendix G). Also accompanying this Report is a copy of the Application for State School Money which was submitted on behalf of the enlarged District for the 1975-76 budget year (see Appendix H). School

districts in Missouri must submit this Application annually between June 15 and June 30 to the State Department of Education. The combined application of the enlarged District was approved by the Board on June 11.